

AWARD AFTER MANDATE

Injury No.: 03-145626

Employee: Charles Michael Angus

Employer: ATK Alliant Techsystems (Settled)

Insurer: Insurance Company of the State of Pennsylvania (Settled)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Preliminaries

On October 12, 2010, the Missouri Court of Appeals for the Western District issued an opinion reversing the January 22, 2010, award and decision of the Labor and Industrial Relations Commission (Commission). *Angus v. Second Injury Fund*, 328 S.W.3d 294 (Mo. App. 2010) (WD72141). By mandate dated January 27, 2011, the Court remanded this matter to the Commission for further proceedings in accordance with the opinion of the Court.

Pursuant to the Court's mandate, we issue this award. Having reviewed the evidence and considered the whole record in light of the opinion of the Court, we reverse the September 4, 2009, award of the administrative law judge and award benefits.

Employee settled his claim against employer/insurer in December 2008. This matter proceeded to the trial of employee's claim against the Second Injury Fund. We denied compensation. We rejected the opinions of Dr. Koprivica that employee was permanently and totally disabled due to a combination of employee's rheumatoid arthritis and his osteoarthritis. Instead, we concluded that employee is permanently and totally disabled as a result of his rheumatoid arthritis considered alone. In its opinion, the Court found we erred in rejecting Dr. Koprivica's uncontradicted causation opinion and adopting our own contrary medical opinion. For that reason, the Court reversed our award.

The Court noted that there is no dispute that employee is permanently and totally disabled. Consequently, the Court directed that we determine and proportion the degree of disability in this matter in accordance with the uncontradicted medical testimony and then we determine the nature and extent of Second Injury Fund liability.

Compensability of Primary Injury

Section 287.067 RSMo provides when an injury by occupational disease is compensable.¹

1. In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment...The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected

¹ Statutory references are to the Revised Statutes of Missouri 2004 unless otherwise indicated.

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with the employment and to have flowed from that source as a rational consequence.

2. An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor.

Missouri Courts have isolated the crucial elements of an occupational disease claim.

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. The inquiry involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort.

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." However, such conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate...

...

As a general rule, disability sustained by the aggravation of a preexisting nondisabling condition or disease caused by a work-related accident is compensable even though the accident would not have produced the injury in a person not having the condition...

...

Aggravation of a preexisting disease or infirmity caused by nonaccidental conditions of employment is compensable as either an accident or as an occupational disease. Aggravation of a preexisting disease or infirmity caused by repetitive trauma is compensable as either an accident or as an occupational disease.²

Dr. Koprivica testified the workplace exposure was a substantial contributing factor in aggravating employee's multiple-joint, degenerative osteoarthritis. Dr. Koprivica identified pushing the heavy buggies as the work exposure that caused the exacerbation of the

² *Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3d 43, 49 (Mo. App. 1999).

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osteoarthritis. The buggies weigh between 600 pounds and 1000 pounds. Dr. Koprivica testified that pushing the buggies applied an unusual whole body stress that was unique to employee's job.

Employee has established through the testimony of Dr. Koprivica that he suffered a compensable aggravation of his osteoarthritis.

Permanent Disability/Primary Injury

In his report, Dr. Koprivica offers his opinion that "[s]eparate from the rheumatoid arthritis, based on the progressive aggravating injury from the exposure to risk at work, I would assign a twenty-five (25) percent permanent partial disability to the body as a whole. I would clearly point out that I would not consider Mr. Angus' work place exposure to be totally disabling, considered in isolation, in and of itself."

The only other evidence bearing on the extent of employee's permanent partial disability from the primary injury is the Stipulation for Compromise Settlement entered into between employee and employer/insurer, wherein the parties settled the claim for the approximate permanent disability of 18% of the body as a whole.

The testimony of Dr. Koprivica regarding the extent of employee's permanent partial disability is entitled to greater weight than the disability percentage reached through compromise and settlement. Based upon the foregoing, we find that employee sustained a 25% permanent partial disability as a result of the aggravation of his degenerative arthritis due to the repetitive trauma he experienced while working.

Based upon the testimony and report of Dr. Koprivica, we find that employee reached maximum medical improvement from his primary injury on May 11, 2004, the date Dr. Whitley first reported that employee was permanently and totally disabled.

The parties stipulated that employee's permanent partial disability rate is \$347.05 per week and his permanent total disability rate is \$454.67 per week.

Second Injury Fund Liability

Having determined that employee sustained only a permanent partial disability attributable to his work injuries, we must consider the nature and extent of the Second Injury Fund's liability.

"Section 287.220 creates the Second Injury Fund and sets forth when and the amount of compensation that shall be paid from the fund in 'all cases of permanent disability where there has been previous disability.'" ³ "In order to be entitled to Fund liability, the claimant must establish either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself." ⁴

³ *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000) (citations omitted).

⁴ *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004) citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo. App. 2001).

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“Liability of the Second Injury Fund is triggered only ‘by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.’”⁵ To implicate the Second Injury Fund, the employee must have an actual and measurable preexisting disability at the time the work injury is sustained of such seriousness as to constitute a hindrance or obstacle to employment.⁶ “To determine whether a preexisting partial disability constitutes a hindrance or obstacle to the employee’s employment, ‘the Commission should focus on the potential that the preexisting injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition.’”⁷

Dr. Koprivica testified that employee suffered from a preexisting permanent partial disability of 50% of the body as a whole attributable to employee’s rheumatoid arthritis. Dr. Koprivica noted that before September 2003, the symptoms of employee’s rheumatoid arthritis should have restricted him from moving the heavy buggies he pushed in his job. The deformity of his fingers prevented employee from performing repetitive fine dexterity tasks with his hands. Employee was restricted to performing regular work for only 3 – 5 hours per day with light duty activities filling the remainder of his work day. Based upon the above work restrictions, we find that employee’s preexisting rheumatoid arthritis constituted a hindrance and obstacle to employee’s employment or reemployment.

Dr. Koprivica testified that when you combine employee’s disability from the rheumatoid arthritis with his disability from the work aggravation of his degenerative osteoarthritis, the disabilities combine synergistically to render employee permanently and totally disabled. Dr. Koprivica specifically stated in his report that employee would not be totally disabled considering only the disability related to employee’s work-related degenerative arthritis. Based upon Dr. Koprivica’s opinions as summarized above, we find employee is permanently and totally disabled due to the combination of his preexisting disability with the disability from his aggravated work-related degenerative arthritis. The Second Injury Fund is liable for the payment of permanent total disability benefits to employee.

Award

Employee is entitled to permanent total disability benefits from the Second Injury Fund. For the period beginning May 12, 2004, and continuing for 100 weeks, the Second Injury Fund owes to employee the weekly amount of \$107.62. Thereafter, the Second Injury Fund shall pay to employee a benefit of \$454.67 weekly for his lifetime, or until modified by law.

Donald Taylor, Attorney at Law, is allowed a fee of 25% of the compensation awarded herein for reasonable and necessary legal services, which shall constitute a lien on compensation.

⁵ *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002), citing *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 215 (Mo. App. 1999), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

⁶ *Section 287.220.1 RSMo.*

⁷ *E.W.*, 89 S.W.3d at 537, citing *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997).

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Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 17th day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD – SECOND INJURY FUND ONLY

Employee: Charles Michael Angus Injury No: 03-145626
Dependents: N/A
Employer: ATK Alliant Techsystems
Additional Party: State Treasurer as Custodian of the Second Injury Fund
Insurer: Ins. Co. State of Pennsylvania
Hearing Date: August 31, 2009 Checked by: RCM/rm

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: alleged September 30, 2003
5. State location where accident occurred or occupational disease was contracted: alleged Independence, Jackson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee alleged that his work exacerbated and/or caused him to suffer from osteoarthritis.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: None.
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$682.00
19. Weekly compensation rate: \$454.67 for permanent total and \$347.05 for permanent partial disability compensation
20. Method wages computation: By Stipulation.
21. Amount of compensation payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Charles Michael Angus

Injury No: 03-145626

Dependents: N/A

Employer: ATK Alliant Techsystems

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Insurer: Ins. Co. State of Pennsylvania

Hearing Date: August 31, 2009

Checked by: RCM/rm

On August 31, 2009, the employee and the State Treasurer as Custodian of the Second Injury Fund ("Fund") appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Charles Michael Angus, appeared in person and with counsel, Don Taylor. The Fund appeared through Assistant Attorney General Richard Wiles. The primary issue the parties requested the Division to determine was whether or not Mr. Angus suffered an accident, series of accidents, or occupational disease arising out of and in the course of his employment. For the reasons noted below, I find that Mr. Angus did not sustain an accident, series of accidents, or occupational disease and deny his Claim for benefits from the Fund.

STIPULATIONS

The parties stipulated that:

1. On or about September 30, 2003 ATK Alliant Techsystems ("ATK") was an employer operating subject to Missouri's Workers' Compensation law with its liability fully insured by Ins. Co. State of Pennsylvania;
2. Mr. Angus was its employee working subject to the law in Independence, Jackson County, Missouri;
3. Mr. Angus notified ATK of his alleged accident, series of accidents, or occupational disease and filed his claim within the time allowed by law;
4. ATK did not provide Mr. Angus with any medical care; and,

5. ATK did not provide Mr. Angus with any temporary total disability compensation.

ISSUES

The parties requested the Division to determine:

1. Whether Mr. Angus sustained an accident, series of accidents, or occupational disease arising out of and in the course of employment?
2. Whether Mr. Angus suffered any disability and, if so, the nature and extent of the Employee's disability and whether the employee is permanently and totally disabled?
3. Whether the Fund is liable to Mr. Angus for any disability compensation?

FINDINGS OF FACT and RULINGS OF LAW

Mr. Angus testified on his own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit A – Deposition, P. Brent Koprivica, MD, April 23, 2009
- Exhibit B – Deposition, Mr. Michael J. Dreiling, April 21, 2009
- Exhibit C – Stipulation for Compromise Settlement, Dec. 18, 2008

The Fund did not present any exhibits or call any witnesses.

Based on the above exhibits and the testimony of Mr. Angus, I make the following findings. Mr. Angus is a single, 54-year old male, who lives with his 85-year old father in Holden, Missouri. He received his high school diploma in 1974 and completed a course for real-estate sales. *See*, Claimant's Exhibit B at 14. Mr. Angus apparently never utilized his real estate training, however, and, instead has worked in manual labor jobs.

The employer in this case, ATK Alliant Techsystems, owns an ammunition plant in Independence, Missouri that has been in operation – albeit by different owners – for many years. In fact, Mr. Angus first went to work at the plant in 1981 when it was owned by Remington. Mr. Angus continued working at the plant until 1996. During this 15-year employment period Mr. Angus' jobs included machine operator, truck driver, and forklift driver. Due to a work slow-down, Mr. Angus left the plant and started a tree-trimming business which he operated from 1996 through 2001. With the advent of the Iraq War, the ammunition plant (now owned by ATK) ramped up production and Mr. Angus returned to work there.

Mr. Angus worked for ATK from August 13, 2001 through February 7, 2004. Mr. Angus' job primarily required him to push "buggies" filled with ammunition; the buggies typically weighed from 500 to 1,000 pounds. In addition, Mr. Angus had to carry "tote pans" that contained defective ammunition; the pans were approximately 3.5 feet long by 1 foot wide and 8 inches deep and weighed (full) around 50 pounds.

Prior to either periods of employment with ATK, Mr. Angus had sustained, in 1974, a severe motor cycle accident that resulted in a compound fracture to his left femur and required a 3-4 month hospitalization. After recovering from this accident, Mr. Angus was able to walk, run, hunt, swim, and water ski.

Throughout his entire work life Mr. Angus has had the same primary care doctor, William E. Whitley, DO. In August 2002 Mr. Angus began experiencing joint pain for which he sought treatment from Dr. Whitley. On August 23, 2002, Dr. Whitley diagnosed Mr. Angus as suffering from rheumatoid arthritis. *See*, Claimant's Exhibit A at 13:4. Within just one month, on September 21, 2002, Dr. Whitley restricted Mr. Angus to no more than four hours per day of carrying with a break every two hours. *Id.* at 64. In July 2003, Dr. Whitley diagnosed Mr. Angus with GERD and chronic pain syndrome. Dr. Whitley noted depression on September 18, 2003. Ultimately, on February 7, 2004, Dr. Whitley put Mr. Angus on a leave of absence. *Id.*

Notwithstanding his severe and debilitating rheumatoid arthritis, Mr. Angus filed a Claim for Compensation on January 18, 2005 alleging that his "entire back has failed and legs have lost strength" due to pushing the ammunition buggies. *See*, Claim for Compensation, items 7 and 8 (Division file). The Employer timely filed its answer specifically denying notice, causation, or that the employee had sustained a compensable accident. *See*, Answer filed February 9, 2005, item 9 (Division file). The employer never provided Mr. Angus either with any treatment or temporary disability benefits. Ultimately, on December 18, 2008, Mr. Angus settled with the employer for a \$24,987.60 lump sum based on 18% disability to his body-as-a-whole. *See*, Claimant's Exhibit C, item 7. The settlement noted that the disputes between the parties included "nature and extent; medical – past and future; and all issues not specifically admitted herein". *Id.*

P. Brent Koprivica, MD examined Mr. Angus on September 16, 2008 at his attorney's request. Dr. Koprivica authored a narrative report of the same date, and testified by deposition taken April 23, 2009. Dr. Koprivica noted that:

- Dr. Mark Killman opined that Mr. Angus' work activities were not the prevailing factor or even a significant contributor to his disability. Instead, Dr. Killman believed that Mr. Angus's problems were related to his inflammatory arthritis. *See*, Claimant's Exhibit A at 13:22-14:4.
- He remembered Mr. Angus "because of the severity of his disease" (*Id.* at 15:24) and even photographed his disfigured knee and finger joints (*Id.* at 23:19). (The photos are found at page 75.)

- Mr. Angus suffered from “degeneration in his joints that was more wear-and-tear type of degeneration.” *Id.* at 10:20.
- Mr. Angus has “severe disability from rheumatoid arthritis” that is a “. . . major contributor to his disability presentation.” *Id.* 18:4-6.
- Mr. Angus has a family history of rheumatoid arthritis. *Id.* at 19:8.
- Mr. Angus’ rheumatoid arthritis requires him to take narcotic medication to manage his pain. *Id.* at 19:18.
- Mr. Angus’ rheumatoid arthritis has deformed his spine so greatly that he is unable to stand up straight (*Id.* at 20:6) such that Dr. Koprivica did not think it would be safe for him to attempt to bend over (*Id.* at 21:5).
- Mr. Angus’ rheumatoid arthritis-related hand problems are so profound that he was unable even to do normal grip strength testing (*Id.* at 20:8-13, and 52:23).
- There is no “. . . relationship between the rheumatoid arthritis and his workplace exposure.” *Id.* at 25:12-13.
- It was possible that Mr. Angus’ “rheumatoid arthritis alone would be sufficient to totally disable him.” *Id.* at 52:18-21.

In addition, Dr. Koprivica acknowledged that it was extremely difficult to apportion the effects of rheumatoid arthritis and osteoarthritis. He noted this was true “. . . because there’s overlap between similar – same joint involvement, from the degenerative process and the rheumatoid arthritis, that overlap is going to make it virtually impossible to do.” *Id.* at 38:10-14.

Dr. Koprivica also acknowledged that it was “obvious” that Mr. Angus’ rheumatoid arthritis was worse in 2008 (when he first examined him) than it was in 2004 (when he could no longer work). Despite this admission, his confession of the difficulty in apportioning Mr. Angus’ rheumatoid arthritis related problems from his osteoarthritis problems, AND the acknowledgement that Mr. Angus’ rheumatoid arthritis alone could totally disable him, Dr. Koprivica nonetheless opined that Mr. Angus was totally disabled from the combined effect of both rheumatoid arthritis and osteoarthritis. *Id.* at 27:3-10.

Regarding any injury to Mr. Angus from his work activities, Dr. Koprivica’s opinion is very weak and is not persuasive. In his narrative report, Dr. Koprivica stated:

Mr. Angus’ exposures to risk at work are felt to represent a substantial factor in a separate diffuse degenerative osteoarthritis. The degenerative osteoarthritis has a causal relationship to the biomechanical stressing from his work with progression based on the exposures at work.

Id. at 70.

At his deposition, Dr. Koprivica testified:

There is a relationship between aggravation of degenerative arthritis. Because that can aggravate and accelerate that process. And I think there can be contribution.

...

I also felt that his exposure to risk at work was a substantial factor in the diffused degenerative osteoarthritis with which he presented.

Id. at 25:14-18, and 23 to 26:1.

What is noteworthy about both Dr. Koprivica's narrative report and his deposition testimony is that he never really substantiated his above causation conclusions regarding Mr. Angus' work and his osteoarthritis. In fact, a clear diagnosis by Dr. Koprivica that Mr. Angus even has osteoarthritis is glaringly absent. Dr. Koprivica emphasized that there was overlap both in joint involvement and effects of rheumatoid arthritis and osteoarthritis. However, he did not clearly state why he believed Mr. Angus had osteoarthritis. Actually, the quotations above assume Mr. Angus had osteoarthritis; they do not diagnosis it or explain what led him to opine about osteoarthritis. Therefore, I find that Dr. Koprivica's opinion that Mr. Angus' work caused or aggravated osteoarthritis is not credible and I disbelieve that opinion.

In addition, I find that Dr. Koprivica's opinion that Mr. Angus' total disability results from the combined effect of rheumatoid arthritis and osteoarthritis lacks credibility and, therefore, I choose to disbelieve and disregard that opinion. Instead, I find that Mr. Angus' rheumatoid arthritis and the profound affect it has had upon him alone renders him permanently and totally disabled. Of course, even Dr. Koprivica admitted that Mr. Angus' work had nothing to do with the development of his rheumatoid arthritis.

Mr. Michael J. Dreiling, a vocational specialist, met with Mr. Angus on December 2, 2008. *See*, Claimant's Exhibit B at 9:11. He conducted a ninety minute interview (*Id.* at 30:17); only administered him one 50-question test that took 12 minutes (*Id.* 24:3); did not review any employment records (*Id.* at 30:21); and did not attempt to find him employment (*Id.* at 30:25). Mr. Dreiling opined that Mr. Angus could not compete for work in the open labor market. *Id.* at 28:4-8.

I really do not take issue with Mr. Dreiling's opinion; even Dr. Koprivica noted that Mr. Angus was so physically disabled that a vocational assessment was not even necessary. *See*, Claimant's Exhibit A at 28:13-15. Mr. Angus' physical presentation is quite profound: although he is six feet six inches tall (*Id.* at 20:5) he is quite hunched over and barely can walk even with assistance and with a cane. I found Mr. Angus to be a credible witness and his situation is very tragic. However, as even Dr. Koprivica admitted, Mr. Angus' work had nothing to do with the development and progression of his rheumatoid arthritis.

Compensability in this case comes down to a question of just what is causing his disability and I simply do not believe Dr. Koprivica's opinion that Mr. Angus' disability results from the effects of both rheumatoid arthritis and osteoarthritis. I note that both Dr. Koprivica and Mr. Dreiling referenced an opinion by Dr. Whitley that pins Mr. Angus' total disability on "severe and crippling osteoarthritis" resulting from his job with ATK. However, Dr. Whitley's report does not even mention rheumatoid arthritis which is very curious given that he diagnosed the condition and has treated him for it for years. In contrast, Dr. Koprivica referenced Dr. Killman's report (ATK's doctor) that attached all of Mr. Angus' disability to his rheumatoid arthritis. However, the Claimant did not offer either Dr. Whitley's report or any of his treatment records, and the Fund did not offer Dr. Killman's report; I am hesitant to make any findings based on snippets of their reports which simply were referenced by Dr. Koprivica and Mr. Dreiling. Therefore, that limits me to evaluating only Dr. Koprivica's opinions which I have already reviewed. Based on my rejection of his opinions, I find that the Claimant did not prove that he sustained an accident, series of accidents, or occupational disease arising out of and in the course of his employment. In addition, even if I had found that he developed osteoarthritis – or such was aggravated – at work, I nonetheless would have found that Mr. Angus was totally disabled by virtue of his severe rheumatoid arthritis alone.

Date: _____

Made by: _____

Carl Mueller
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

 Naomi Pearson
Division of Workers' Compensation